

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

In The Matter Of:

NANCY NEUFELD,

Defendant.

HUDALJ 91-1630-PF
Decided: January 3, 1992

Andrea Bernardo, Esq.
For the Plaintiff

Joseph M. Stec
For the Defendant

Before William C. Cregar
Administrative Law Judge

INITIAL DECISION

The plaintiff, the U.S. Department of Housing and Urban Development ("the Department") or ("HUD") seeks the imposition of damages and a civil penalty against Defendant Nancy Neufeld, a HUD employee, pursuant to the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. Secs. 3801-3812 ("the Act") and HUD's implementing regulations at 24 C.F.R. Part 28. The Department asserts that on three separate occasions Ms. Neufeld submitted false travel vouchers when she knew or had

reason to know that these vouchers were false. 31 U.S.C. Sec. 3802(a)(1). HUD seeks an assessment in the amount of \$71.94¹ and a civil penalty of \$3,000.

While admitting that she submitted three false travel vouchers, the Defendant denies having done so knowingly or after having had reason to know they were false. The Defendant further asserts that the amount sought both for the assessment and the civil penalty are unsubstantiated and unjustified.

This action was initiated by a complaint filed on December 14, 1990. Defendant answered the complaint on January 30, 1991, claiming, *inter alia*, that HUD lacked jurisdiction to bring this action, asserting that the filing of a false travel voucher was not

a "claim" as defined in 31 U.S.C. Sec. 3810(a)(3); that this action is barred because disciplinary action was taken by HUD against the Defendant; and that written permission to take this action was not obtained from the Department of Justice as required by 31 U.S.C. Sec. 3803(b)(1) and 24 C.F.R. Sec. 28.11(a)(1). A HUD Motion to Strike these defenses was granted by Order dated June 18, 1991.

On June 17, 1991, Defendant sought to obtain a copy of HUD's notice to the Department of Justice that it intended to issue a complaint. This request was denied by Order dated June 25, 1991. On July 3, 1991, Defendant filed a Motion for Reconsideration of the June 18 and 25, 1991, Orders and on July 9, 1991, filed a Motion for Certification of Review of these Orders by the Secretary. Specifically, Defendant sought reconsideration and review of the denial of her claim that HUD lacks jurisdiction to bring this action and denial of her attempt to obtain a copy of HUD's Notice to the Attorney General. Finally, on July 9, 1991, Defendant filed a Motion to Compel HUD to make employee witnesses available without resorting to the requirements set forth in the regulations for the taking of depositions. 28 C.F.R. Sec. 28.41. These Motions were denied by Order dated July 15, 1991.

At prehearing telephone conferences held on July 23 and 24, 1991, the parties agreed to submit their evidence via a stipulated record rather than an oral hearing. By Order of July 25, 1991, dates were established for the submission of the stipulated record, post hearing and reply briefs, Defendant's Motion for Summary Judgment, and the Department's Reply to that Motion. On August 5, 1991, Defendant filed an unopposed Motion for Extension of Time which was granted by Order dated August 13, 1991. The Order granting the extension of time established October 4, 1991, as the

¹HUD seeks an assessment of \$156.88 which is equal to twice the amount of the improper claim, \$78.44. However, Ms. Neufeld previously reimbursed the United States in the amount of \$84.94. The Department is amenable to deducting an amount equal to the amount reimbursed from the claimed assessment. Government's Memorandum in Support of the Imposition of Damages and Civil Penalties, p. 3.

filing date for reply briefs and the Department's Reply to Defendant's Motion for Summary Judgment. Accordingly, the record closed on October 4, 1991.

Findings of Fact

Defendant Nancy Neufeld is a Loan Specialist (Realty) in the HUD Office in Denver, Colorado. Her duties required her to travel in order to conduct on-site reviews of mortgagees. Rec., Doc. 1, p. 10.² On May 9, 1989, October 25, 1989, and April 2, 1990, Ms. Neufeld submitted false travel vouchers.³ Each of these vouchers, respectively, states a claim for reimbursement from HUD for the following travel periods: May 1, 1989-May 4, 1989⁴, October 16, 1989-October 19, 1989, and March 26, 1990-March 29, 1990. Each voucher, filed within a week after the completion of the travel, claims reimbursement for three night's lodging, when, in fact, Ms. Neufeld stayed overnight only on two nights. Rec., Doc. 1, Exs. 1-3. The vouchers, respectively, state excess claims in the amounts of \$39.22, \$39.22, and \$40.28⁵, for total of \$118.72. Ms. Neufeld was paid the excess reimbursement for the first two vouchers in the amount of \$78.44, but she was not paid for the third trip, because the error was detected by her second-line supervisor, Leon Mayberry, before she was paid. Rec., Doc. 1, pp. 3, 9.

Along with the vouchers, Ms. Neufeld attached copies of the hotel receipts. These receipts reflect lodging for two nights, rather than three, for each of the three trips. Thus, an examination of the documentation in support of the vouchers would have revealed that the amounts claimed on the voucher were false. Rec., Doc. 1, Exs. 1-3. It was such an examination of the third voucher by Mr. Mayberry, which resulted in his discovery of this and the other two false claims. Rec., Doc. 1, p. 3.

² The following abbreviations have been used: "Rec." for the stipulated record; "Doc." for documents in the stipulated record; "Ex." for exhibits attached to Office of Inspector General Investigation which is Document 1 of the stipulated record; and "Atch." for attachments to Document 3 of the stipulated record.

³ These vouchers are subsequently referred to, respectively, as the first, second and third vouchers.

⁴ The front pages of the first and second vouchers identify the actual periods of travel as May 1, 1989-May 3, 1989 and October 16, 1989-October 18, 1989 (mistyped as September 16, 1989-September 18, 1989). The entries on the front pages of these vouchers are facially inconsistent with the attached schedules of expenses that list three nights when there can only have been two. Rec. Doc. 1, Ex. 3, pp. 1, 2; Ex. 2, pp. 1, 2.

⁵ Ms. Neufeld claimed \$40.28 for third trip rather than the actual cost of \$39.22. She also erroneously claimed an additional \$6.50 as part of the per diem for the first trip. HUD does not include this claim among the allegations in the Complaint.

Each voucher contains a certification statement above Ms. Neufeld's signature which states:

I certify that this voucher is true and correct to the best of my knowledge and belief, and that payment or credit has not been received by me. When applicable, per diem claimed is based on the average cost of lodging incurred during the period covered by this voucher.

Below the signature line is the following warning:

NOTE: Falsification of an item in an expense account works a forfeiture of claim (28 U.S.C. 2514) and may result in a fine of not more than \$10,000 or imprisonment for not more than 5 years or both (18 U.S.C. Sec. 287; i.d. 1001).

Rec., Doc. 1, Exs. 1-3.

Ms. Neufeld did not use a credit card; rather, she paid her expenses in cash. Because she required cash, she would obtain a travel advance. In order to determine the amount of this advance and to expedite submission of the voucher on her return, she prepared a "draft" voucher. When she arrived at the hotel she sometimes would pay the whole amount of the anticipated bill in advance and would receive a refund if she left early. Upon her return she would revise the "drafts". Rec., Doc. 1, pp. 1, 11. A review of the three hotel receipts attached to the vouchers reveals that she received cash back from the hotel only on one of the three trips. Rec., Doc. 1, Ex. 1, p. 3. A comparison of the vouchers with the travel authorizations for each of these trips establishes that on each of these occasions the actual trip was shorter than she originally had planned. Rec., Doc. 1, Exs. 1-3.

Unless audited, travel vouchers receive little or no review. Rec., Doc. 1, p. 7. A review consists of making sure that documentation in support of the charges is attached, not examining the supporting documentation and comparing it with the amount claimed on the voucher. Ten percent of vouchers for claims of less than \$500 are audited. *Id.* Of the three vouchers submitted by Ms. Neufeld, none were audited and all but the third were approved by two levels of supervision. The false claim in the third voucher was detected by Mr. Mayberry. Rec., Doc. 1., p. 3.

After having been informed of the erroneous payments Ms. Neufeld reimbursed HUD. Rec., Doc. 3, Atch. 2. On May 16, 1990, she received an official reprimand for submitting vouchers containing false claims. Rec., Doc. 3, Atch. 1. She attended a

travel voucher training session in the Summer of 1990. Rec., Doc. 3, p. 4. On October 23, 1990, she received an overall rating of "highly successful" on her performance appraisal for the period from October 1, 1989, to September 30, 1990, and received a "highly successful" rating on "Element 3" which includes the preparation of travel vouchers. Rec., Doc. 3, Atch. 4. Her rating officials, Mr. Mundt and Mr. Mayberry, were the same individuals who supervised her during the period the false vouchers were filed. In fact, it was Mr. Mundt who had previously issued the official reprimand.

From April 5 to 23, 1990, an investigation of this matter was conducted by HUD's Office of Regional Inspector General. On April 30, 1990, a copy of the Report of Investigation was sent by Patrick J. Neri, Assistant Inspector General for Investigation, to John P. Kennedy, Associate General Counsel for Program Enforcement. The Report concluded that the three vouchers contain false claims, stating: "The attached Report of Investigation is forwarded for your consideration as a case that may warrant possible Program Fraud Civil Remedies Act action." Attach. A. to Defendant's Motion for Summary Judgment.

For the reasons discussed below, the claims submitted by Defendant violate 24 C.F.R. Sec. 28.5. See, 24 C.F.R. Sec. 28.73(b)(1).

Defendant's Motion for Summary Judgment

Defendant's Motion for Summary Judgment asserts the Report of Investigation is invalid because it fails to furnish "findings and conclusions" required by law and regulation. Motion for Summary Judgment at 3. Section 3803(a)(1) of 31 U.S.C. requires that the investigating official report the "findings and conclusions of [the] investigation to the reviewing official" 31 U.S.C. Sec. 3803(a)(1). See 24 C.F.R. Sec. 28.7(b). In fact, the Report and the transmittal letter contain both conclusions and findings. Mr. Kennedy's transmittal to Mr. Neri sets forth a conclusion, i.e., that Defendant's misdeeds should be considered as warranting possible redress under the Act. Attach. A to Motion for Summary Judgment. In addition, because the Report of Investigation contains un rebutted statements and documentary evidence that three false claims were submitted by Defendant based upon which Mr. Neri decided to forward the matter to Mr. Kennedy, the Report of Investigation contains findings.

Defendant also attacks the Report because Mr. Neri did not personally compile the Report and participate in the investigation. Motion for Summary Judgment at 5-6.

While the Act specifies that the investigating official must be recompensed at the GS-16 level at least, it does not preclude the investigating official from delegating duties to subordinates during the course of the investigation. See 31 U.S.C. Sec. 3801(a)(4)(B).⁶

The Motion raises other matters which were either dismissed by this tribunal earlier in these proceedings or are discussed below in connection with Defendant's defenses to the action.

Governing Legal Framework

⁶Defendant attempts to avoid liability by placing the blame on other HUD employees who approved her vouchers without scrutinizing them. Motion for Summary Judgment, pp. 10-12. Negligence by these other employees does not constitute a defense to Defendant's actions or release her from liability imposed by the Act.

Congress established the Program Fraud Civil Remedies Act to address fraud cases involving small dollar amounts lost by the Government. It recognized that, although the Government has judicial remedies at its disposal, the costs of such litigation is often greater than the amount lost through the individual fraud.⁷ Thus, the Government usually chose not to prosecute with a resulting loss of millions of dollars each year. To remedy this situation, Congress provided for an administrative adjudicatory process to afford the Government the opportunity not only to recapture the monies lost, but also to stem the erosion of public confidence in Government programs and administration. See H.R. Rep. No. 1012, 99th Cong., 2d Sess. 257-58 [hereinafter 1986 House Report], reprinted in 1986 *U.S. Code Cong. & Admin. News* 3902-03. In addition, the Act is intended to deter future fraudulent conduct. *Id.*; S. Rep. No. 212, 99th Cong., 1st Sess. at 2 (1985) [hereinafter 1985 Senate Report].

The Act provides that any person submitting a claim to the Government "that the person knows or has reason to know . . . is false, fictitious, or fraudulent [or] includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent . . . shall be subject to, in addition to any other remedy that may be prescribed by law, a civil penalty of not more than \$5,000 for each such claim." 31 U.S.C. Sec. 3802(a)(1); 24 C.F.R. Sec. 28.5(a). Moreover, if the Government has paid such a claim, it may assess up to twice that amount against the claimant. *Id.* Secs. 3802(a)(1)(D), 3802(a)(3). The assessment is "in lieu of damages sustained by" the Government. 31 U.S.C. Sec. 3802(a)(1); 24 C.F.R. Sec. 28.5(a)(5). A claim includes any "submission made to . . . HUD for . . . money" which may have "the effect of decreasing an obligation to pay or account for . . . money." 24 C.F.R. Sec. 28.3. The Act is only applicable, however, if the claim is not in excess of \$150,000. 31 U.S.C. Sec. 3803(c)(1).

An individual need not have a specific intent to defraud the Government to be liable under the Act. However, the Government must prove by a preponderance of the evidence that the individual "knows or has reason to know" that a claim is false. 31 U.S.C. Secs. 3801(a)(5), 3803(f); 24 C.F.R. Secs. 28.5(d), 28.59(b). This standard may be met in one of three ways: if that person (1) has "actual knowledge that the claim . . . is false;" (2) acts "in deliberate ignorance of the truth or falsity of the claims;" or (3) acts "in reckless disregard of the truth or falsity of the claim." 31 U.S.C. Sec.

⁷ One judicial remedy is the False Claims Act, 31 U.S.C. §§ 3729-3731, which allows the Government to seek civil penalties from \$5000-\$10,000 for each fraudulent claim, as well as a maximum of three times the amount of damages that the Government suffers. Both laws have comparable definitions of "knowing" fraud and both permit compensation for the Government's loss. Compare 31 U.S.C. § 3729 with § 3802 for other similarities.

3801(a)(5); 24 C.F.R. Sec. 28.3. Claimants who recklessly disregard facts that are known or "readily discoverable upon reasonable inquiry" are liable, while those operating merely through "mistake, momentary thoughtlessness, or inadvertence" are not. 1986 House Report at 259. "Only those individuals who are extremely careless, who demonstrate an extreme departure from ordinary care" are subject to liability. 1985 Senate Report at 20.

Once liability is established, HUD regulations identify 16 factors to be considered in determining the amount of the penalty and assessment. These factors are: (1) the number of false claims; (2) the time period over which they were made; (3) the degree of culpability; (4) the amount of money falsely claimed; (5) the Government's loss, including investigation costs; (6) a comparison of the amount of the penalty to the Government's loss; (7) the potential or actual impact of the misconduct upon the national defense, public health or safety, or public confidence in the management of Government programs and operations, including particularly the impact on intended beneficiaries of such programs; (8) any pattern of misconduct; (9) any attempts to conceal the misconduct; (10) whether the defendant involved others in the misconduct or its concealment, (11) where an agent's misconduct is imputed to the defendant, the extent to which the defendant's practices fostered the misconduct of others; (12) the defendant's cooperation in the Government's investigation (13) the defendant's assistance in prosecuting other wrongdoers; (13) whether the defendant assisted in identifying other wrongdoers; (14) the complexity of the program or transaction, and the degree of the defendant's sophistication, including defendant's prior participation in the program or similar transactions; (15) any previous criminal, civil, or administrative findings of dishonest dealings with the Government; and (16) the need to deter the defendant and others from engaging in similar misconduct. 24 C.F.R. Sec. 28.61(b). In addition, the administrative law judge may consider any other factor that mitigates or aggravates the offense. *Id.* Sec. 28.61(c).

Discussion

Defendant knew or had reason to know that the claims were false.

Defendant does not dispute that she submitted false claims. Rather, she claims that her actions were not knowing, but simply negligent. She professes to have committed an "honest mistake." Rec., Doc. 1, pp. 14-16. However, the record establishes that her actions were taken with actual knowledge that the claims were false, and were not merely negligent.

First, she submitted each of the three false vouchers less than a week after completing her trips. It is highly improbable that she would have forgotten the number of

nights she stayed at a hotel less than a week after returning home.⁸ Second, the improbability of her forgetting how many nights she lodged is also demonstrated by the fact that each night's lodging constituted a significant rather than a minor proportion of her travel expense. Third, an examination of the complexity of the Government program reveals that Defendant needed no high degree of sophistication or competence to claim the correct number of nights lodging.⁹ Finally, within less than a year she submitted three claims containing the same egregious error. The repetition of these claims within a relatively short period evidences a pattern of misconduct rather than accident or mistake. The proximity in time of the submission of the claims to the actual travel, the relative significance of the "forgotten" facts, the relatively unsophisticated nature of the program, and the repetition of the "forgetfulness" demonstrates actual knowledge that each claim was false.

Accordingly, a preponderance of the evidence establishes that Defendant knowingly submitted three false claims. 31 U.S.C. Sec. 3802(a)(1)(A); 24 C.F.R. Sec. 28.5(a)(1)(i).

An appropriate civil penalty and assessment should be awarded.

The Act authorizes a civil penalty of up to \$5,000 for each false claim and an assessment of up to twice the amount of the claim. However, an assessment is inappropriate "with respect to a claim if payment by the Government has not been made on such claim." 31 U.S.C. Sec. 3802(a)(3). HUD requests a penalty of \$1000 for each false claim and an assessment of twice the amounts of the first two claims, i.e., the claims that were paid to the Defendant, for a total of \$156.88. HUD also agrees that \$84.94 reimbursed by the Defendant may be applied to the assessment, thus making the remaining assessment \$71.94.

Defendant asserts that, because she repaid the amounts of the falsified claims that HUD suffered no loss and, therefore, the Government is not entitled to an assessment. Contrary to Defendant's assertions, liability under the Act does not turn on whether the

⁸ Defendant's claim that she relied on the hotel receipts to revise draft vouchers refutes her claim that she was negligent. Each receipt sets forth the number of nights that she actually stayed.

⁹ The ambiguity or clarity of relevant regulations and the resources and sophistication of the defendant are relevant to a determination of liability. Thus, for example, "[a] low-income individual applying for a student loan [has] a different obligation than an established government contractor that certifies its cost This standard . . . allows determinations of liability to be tailored to the program, with persons judged according to the general conduct of others participating in the same program." 1985 Senate Report at 21-22.

Government was subsequently reimbursed, but whether the Government paid an improper claim. 31 U.S.C. Sec. 3802(a)(3). See also 24 C.F.R. Sec. 28.5(a)(5). In addition, HUD sustained unspecified losses because of the expenditures associated with the investigation made necessary by Defendant's acts. See 24 C.F.R. Sec. 28.61(a)(5). See also 31 U.S.C. Sec. 3802(a)(1)(D). Finally, allowing a defendant to escape the consequences of a fraudulent claim merely by reimbursing the Government would defeat one of the deterrent effects of the Act.

Considering the factors applicable¹⁰ to the determination of an assessment and penalty set forth at 24 C.F.R. Sec. 28.61, the record establishes the following:¹¹ 1) Defendant submitted three false claims during a ten-month period. The frequency and short period within which the claims were submitted establish a pattern, rather than accident or mistake. 2) As discussed above, the record establishes that Defendant is guilty of having knowingly submitted false information, rather than deliberate ignorance or reckless disregard of its truth or falsity. The degree of her culpability is, accordingly, greater than if she had been deliberately ignorant or reckless. 3) Neither the amount of money which Defendant illegally claimed, nor the actual loss to the government is large. While the investigation must have resulted in some cost to the government, no evidence of the amount of this cost was introduced, hence, investigative costs have not been considered for the purpose of determining the amount of an assessment or civil penalty. 4) Except for failing to accurately disclose the number of nights she was on travel status, Defendant did not attempt to conceal her misconduct. Rather, the correct information was attached to the vouchers and available to anyone who would have taken the time to review them. With the exception of Defendant's reliance on others not to scrutinize her claims carefully, the record does not establish that she actively involved others or attempted to involve them in her scheme. 5) The submission of travel vouchers is not complex nor does it involve a high degree of sophistication on the part of the employee.

The final factors are the need to deter Defendant and others from engaging in the same or similar misconduct, and the relationship of the amount to be imposed to the amount of the Government's loss. I conclude that Defendant is unlikely to engage in

¹⁰Evidence is lacking for five of these factors. As a result, I have not considered them applicable in this case. These five factors are: 1) The impact of the misconduct on the national defense, public health or safety, or the confidence of the public in Government operations; 2) the extent to which the Defendant's practices fostered an agent's misconduct; 3) the defendant's assistance in prosecuting other wrongdoers; 4) the defendant's cooperation in the Government's investigation; and 5) whether the Defendant has been found guilty of similar misconduct in other proceedings.

¹¹For ease of presentation I have grouped certain factors together and have discussed them in a different order from that of the regulation.

similar misconduct. The record establishes that she previously received a letter of reprimand for this misconduct, reimbursed HUD, attended a travel voucher training session and, subsequent to her misconduct, received a "highly successful" on a critical element which includes the preparation of travel vouchers. Nonetheless, a penalty is warranted in order to demonstrate to others that similar misconduct will not be tolerated.

The factors discussed above reveal that while the amounts falsely claimed and damage to the Government were small, and Defendant is unlikely to commit similar acts of misconduct, the high degree of Defendant's culpability and the need to deter others warrant the imposition of an assessment and significant civil penalty. Having considered these factors, including the relationship of the amount to be imposed to the amount of the Government's loss, I conclude that an assessment of \$71.94 and a civil penalty in the amount of \$1,200 is warranted under the facts of this case.

ORDER

Having concluded that Defendant's Motion for Summary Judgment lacks merit and that Defendant violated 31 U.S.C. Sec. 3802 and 24 C.F.R. Sec. 28.5 it is ORDERED that

(1) Defendant's Motion for Summary Judgment is denied;

(2) On the date this decision becomes final, Defendant shall be liable to the United States for:

(a) an assessment in the amount of \$71.94, and

(b) a civil penalty in the amount of \$1,200.

Defendant has the right:

(1) to file a motion for reconsideration with this tribunal within twenty (20) days of receipt of this decision in accordance with 24 C.F.R. Sec. 28.75; or

(2) pursuant to 31 U.S.C. Sec. 3803(i), to file a notice of appeal with the Secretary or Under Secretary of HUD within thirty (30) days of issuance of this decision or a decision concerning a motion for reconsideration, in accordance with 24 C.F.R. Sec. 28.77.

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WILLIAM C. CREGAR
Administrative Law Judge

Dated: January 3, 1992